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VIA FACSIMILE and FEDERAL EXPRESS

Ross Johnson, Commissioner and Chair
Commissioners Timothy A. Hodson, A. Eugene Huguenin, Jr.,
Robert Leidigh, and Ray Remy
CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION
428 J Street, Suite 800
Sacramento, California 95814-2329

Re: Proposed New Regulation: Title 2 Cal. Code Regs., § 18420.1
September 11, 2008 Agenda, Item 8, Pre-Notice Discussion
(*Vargas, et al. v. City of Salinas, et al.* [Cal. Supreme Ct. Case No. S140911])

Dear Chairman Johnson and Members of the Commission:

On behalf of the City of Salinas and as counsel for the City in the Vargas, et al. v. City of Salinas, et al. matter now pending before the California Supreme Court (Case No. S140911), we write to express in the strongest terms our objection to the above-referenced proposed new regulation and its consideration for passage at this time.

The FPPC should not regulate at this time when these very issues are before the California Supreme Court. It is unknown what the Court will say is the proper constitutional standard. Therefore, it is possible the proposed new regulation may run afoul of it, requiring additional regulatory action after the opinion to correct the regulation to conform to the opinion or rescind the regulation.

Surprisingly, the staff memorandum expressly states the regulation is proposed as an attempt to affect the outcome and reasoning of the case pending before the California Supreme Court. Thus, it attempts to interfere with the litigation and the judicial process. The proper way to weigh in on the issues before the supreme court would have been to submit to the court an *amicus curiae* brief.

Any changes to the code of regulations will not properly be applicable to the Vargas case in any event, because such regulations will not have existed at the time of the alleged speech in the case.

Moreover, the staff memorandum's concern with the court of appeal opinion is misplaced. First, since the grant of review by the California Supreme Court, the decision is no longer law in California and cannot be cited or relied on by anyone.

Further, as this Commission is surely aware, or should be, the California Government Code already provides for treatment of the violations alleged by the Plaintiffs here, in addressing illegal expenditure of public funds – the basis on which the Plaintiffs' suit it based: The proper test for whether the government has illegally expended public funds on campaigning is "express advocacy" under Government Code section 54964. That term is defined in the regulations promulgated by this Commission under the Political Reform Act, at Title 2, California Code of Regulations, section 18225, subdivision (b)(2).

A review of the legislative history underlying Government Code section 54964 reveals the California Legislature took great pains to adopt an extremely limited prohibition on government speech in the election context so that the statute would withstand constitutional scrutiny.

While we recognize the legislative standard in Government Code section 54964 does not control the FPPC's interpretation of the Political Reform Act, in enacting that statute the Legislature explicitly relied upon the FPPC's current regulation, which had been in effect for many years. For the FPPC to change that regulation now, when the constitutionality of the state statute (and related statutes) is pending before the California Supreme Court, unnecessarily muddies the waters at this very late stage of the game. Local governments have been waiting for this decision for a long time because it will bring clarity to this important issue. The FPPC, which also desires clarity, could achieve it better by letting its regulation stand until the Court determines the constitutional issues, which likely will occur in the not-too-distant future. This regulatory discussion will be more appropriate then, when everyone, including the FPPC, will know how the Court views the constitutional restraints on expenditures of public funds. To hold the discussion now invites more confusion rather than clarity, might further delay the Court's ruling (if additional briefing results), and almost certainly will result in a regulation that has to be revisited again when the Court does rule.

In the section of the Government Code providing the powers and duties of local governments, the only "unlawful" expenditure of public funds is one "used for communications that expressly advocate the approval or rejection of a clearly identified ballot measure, or the election or defeat of a clearly identified candidate, by the voters." (Govt. Code, § 54964, subd. (a), (b)(3) [emph. added].)

On the other hand, government may produce and disseminate informational materials to voters about the impact of a clearly identified ballot measure, provided the materials are "accurate, fair, and impartial" and not otherwise prohibited by law. (Govt. Code, § 54964, subd. (c); *see* Govt. Code, § 8315, subd. (d).)

In addition, Government Code section 8314 prohibits local agencies from making statements and expending public funds to do so, if the statements are considered a "contribution" under section 82015 or an expenditure under section 82025. Section 18225 of the Regulations defines such statements already, as discussed herein, in particular, prohibiting "express words of advocacy such as 'vote for,' 'elect,' 'support,' 'cast your ballot,' 'vote against,' 'defeat,' 'reject,' 'sign petitions for' or otherwise refers to a clearly identified candidate or measure so that the communication, taken as a whole, unambiguously urges a particular result in an election."

There is no need for an additional regulation, particularly one which contains a different test, when the Legislature has dictated that these definitions under sections 82015 and 82025 apply to statements by local agencies concerning ballot measures.

In its early stages, Assembly Bill 2078, which became Government Code section 54964, proposed a bar on local agency communications which "either expressly *or by implication*" advocated the approval or rejection of a ballot measure. (Sen. Am., June 12, 2000, Assem. Bill No. 2078 (1999-2000 Reg. Sess.) [emphasis added].) In the Senate Committee, however, concerns were raised that barring advocacy "by implication" might catalyze a "broad interpretation" of the prohibitions on government conduct, thus simply deferring the need to "the judicial branch to apply limits," and creating an "open invitation to litigation." (Sen. Am. Aug. 25, 2000, Assem. Bill No. 2078 (1999-2000 Reg. Sess.) [amended to strike "by implication" from the proposed language, leaving only "expressly advocate"]; Sen. Rules Comm'ee, Floor Analysis, Aug. 28, 2000, Assem. Bill No. 2078 (1999-2000 Reg. Sess.), p. 4 [League of California Cities opposes definition which includes "by implication" as "vague"].)[1] In final form, the statute excluded "by implication" from its language and made "express advocacy," as interpreted by the courts, the sole prohibition on government speech prior to an election.

Of particular interest to the issues before this Commission, the legislative documents expressly reference the *Stanson v. Mott* decision ((1976) 17 Cal.3d 217) and its "style, tenor and timing" test (and the Attorney General Opinion following it).[2] Nevertheless, the final version of the statute makes illegal only government expenditure of public funds on materials which "expressly advocate".

Most importantly, the FPPC staff memorandum misreads the opinion of the court of appeal in this case, particularly the holding, which, quite distinct from imposing a pure "yea" or "nay" type requirement (see the list of examples at the beginning of 18225, subdivision (b)(2)), but, rather, essentially imposes 18225(b)(2) as the standard for judging whether the government illegally expended funds on campaign speech:

> "To sum up, we conclude that the proper measure for judging whether defendants' communications were promotional is the express advocacy standard, as embodied in the cited Government Code provisions. (See *Buckley*[*v. Valeo* (1976) 424 U.S. 1], *supra*, 424 U.S. at pp. 77, 80; *Governor Gray Davis Com.*[*v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449], *supra*, 102 Cal.App.4th at p. 471; *Schroeder*[*v. Irvine City Council* (2002) 97 Cal.App.4th 174], *supra*, 97 26 Cal.App.4th at p. 186.) A communication meets that standard when it "contains express words of advocacy" or, when " 'taken as a whole, [it] unambiguously urges a particular result in an election.' " (*Schroeder*, at p. 186, quoting Cal.

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[1] See also Sen. Hrg. Aug. 9, 2000, Assem. Bill No. 2078 (1999-2000 Reg. Sess.), p. 2; Sen. Rules Comm'ee, Floor Analysis, Aug. 10, 2000, Assem. Bill No. 2078 (1999-2000 Reg. Sess.), p. 4; Sen. Rules Comm'ee, Third Reading, Aug. 25, 2000, Assem. Bill No. 2078 (1999-2000 Reg. Sess.), p. 5.

[2] See Assem. Elec., Reapport. & Const. Ams. Comm'ee, Third Reading [re: bill as amended May 15, 2000], Assem. Bill No. 2078 (1999-2000 Reg. Sess.), p. 3; Assem. Elec., Reapport. & Const. Ams. Comm'ee Hrg., May 8, 2000, Assem. Bill No. 2078 (1999-2000 Reg. Sess.), pp. 3-4; Assem. Elec., Reapport. & Const. Ams. Comm'ee Hrg., June 21, 2000, Assem. Bill No. 2078 (1999-2000 Reg. Sess.), p. 1; Sen. Elec. & Reapport. Comm'ee Hrg., Aug. 9, 2000, Assem. Bill No. 2078 (1999-2000 Reg. Sess.), p. 1; Sen. Rules Comm'ee, Third Reading, Floor Analysis [re: bill as amended Aug. 7, 2000], Assem. Bill No. 2078 (1999-2000 Reg. Sess.), p. 2; Sen. Elec. & Reapport. Comm'ee Hrg., Aug. 9, 2000; Sen. Rules Comm'ee, Third Reading, Floor Analysis [re: bill as amended Aug. 18, 2000], Assem. Bill No. 2078 (1999-2000 Reg. Sess.), p. 2; Sen. Elec. & Reapport. Comm'ee Hrg., Aug. 9, 2000; Sen. Rules Comm'ee, Third Reading, Floor Analysis [re: bill as amended Aug. 25, 2000], Assem. Bill No. 2078 (1999-2000 Reg. Sess.), p. 2; see also Sen. Elec. & Reapport. Comm'ee Hrg. June 21, 2000, Assem. Bill No. 2078 (1999-2000 Reg. Sess.), p. 3 [suggesting "accurate, fair and impartial" as a test is also vague].

Code of Regs., tit. 2, § 18225, subd. (b)(2).)" (Slip Opn., at pp. 25-26, emph added.)

Thus, the court of appeal applied a test which considers both "magic words" and the entirety of the language to determine whether the whole unambiguously urges a particular result.

The staff memorandum and the proposed new regulatory standard also ignores U.S. Supreme Court authority that limits restrictions on campaign speech to pure express advocacy (e.g., vote yes, vote no, etc.), including recent cases following *Buckley v. Valeo* (1976) 424 U.S. 1, 43-44 & fn. 52, 77, 80 & fn. 108. (See also *California Pro-Life Council, Inc. v. Getman* (9th Cir. 2003) 328 F.3d 1088; *Center for Individual Freedom v. Carmouche* (5th Cir. 2006) 449 F.3d 655, 663-666, *cert. den.* 127 S.Ct. 2258, 167 L.Ed.2d 1092 (2007); *Fed. Elec. Comm'n v. National Conservative Political Action Committee* (1985) 470 U.S. 480, 493-494, 496-497, 498, 500-501; *Fed. Elec. Comm'n v. Massachusetts Citizens for Life, Inc.* (1986) 479 U.S. 238, 248-250 (opn. of Brennan, J.); *id.*, at p. 265 (opn. of O'Connor, J.); *Fed. Elec. Comm'n v. Wisconsin Right to Life, Inc.* (2007) ___ U.S. ___ [127 S.Ct. 2652, 2671-2684, 168 L.Ed.2d 329]; *Governor Gray Davis Committee v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 469-471; *Fed. Elec. Comm'n v. Furgatch* (9th Cir. 1987) 807 F.2d 857, 863-864; *Kidwell v. City of Union* (6th Cir. 2006) 462 F.3d 620, 621-625 ["[I]t is imperative that government be free to make unpopular decisions without opening the public fisc to opposing views."], *cert. den.* 127 S.Ct. 938, 166 L.Ed.2d 704 (2007), all of which confirm the necessity for a bright-line standard to avoid unconstitutional vagueness and overbreadth.) This regulation would violate that limitation.

Lastly, a regulation which generally prohibits local governments from providing information about ballot measures unless it is fair and impartial creates numerous issues, and potentially could wreak havoc on public entities' staff personnel in providing information to their governing bodies to assist the elected officials in making decisions. For example, may staff reports ever legally make recommendations on how to proceed, or would opponents of such a recommendation assert that the recommendation is campaign advocacy because it takes a position and, thus, is not fair and impartial? Must all information disseminated by the local government, even statements during public meetings, anticipate and include all potential differing viewpoints in order to be insulated from suit that it is not fair and impartial? What if staff or the elected officials fail to anticipate a certain view? Would this new regulation essentially require local government to make every statement an "open" or "public" forum, to which all parties may have equal time to add their statement, even in such writings as Minutes of public meetings, government websites, regular newsletters, and staff reports?

For these reasons, the City of Salinas urges this Commission to refrain from taking any action whatsoever to regulate on this issue before the California Supreme Court decides the issues and any U.S. Supreme Court review of the case is concluded.

Sincerely,

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